

NOT FOR PUBLICATION

CSD 3000C [11/15/04]

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In Re GEORGE PETROU, an individual,

Debtor.

LODGED

BANKRUPTCY NO. 02-08705-PB7

THOMAS RUBEN, an unsecured creditor,

Plaintiff(s)

ADVERSARY NO. 03-90413-PB

v. GEORGE PETROU, an individual and,
IRENE PETROU STAFFORD, an individual,

Defendants(s)

Date of Hearing: May 2, 2005
Time of Hearing: 2:00 p.m.
Name of Judge: Hon. Peter W. Bowie

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

IT IS ORDERED THAT the relief sought as set forth on the continuation pages attached and numbered two (2) through 10 with exhibits, if any, for a total of 11 pages, is granted. Notice of Lodgment Docket Entry No. 23

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DATED: **May 12, 2005**

Signature by the attorney constitutes a certification under Fed. R. of Bankr. P. 9011 that the relief in the order is the relief granted by the court.

Submitted by:

Robbins & Keehn, APC
(Firm name)

Judge, United States Bankruptcy Court

By: //s/ L. Scott Keehn
Attorney for Movant Respondent

The motion (the "Motion") of Plaintiff, Thomas Ruben ("Plaintiff"), against defendants, George Petrou ("Debtor") and Irene Petrou Stafford ("Irene"), for entry of summary judgment came on regularly for hearing at 2:00 p.m. on May 2, 2005, in Department Four (4) of the above entitled Court located at 325 West "F" Street, San Diego, California, the Honorable Peter Bowie presiding. Appearances were made by the firm of Robbins & Keehn, APC by L. Scott Keehn on behalf of Plaintiff, , and such other appearances were made as are reflected in the Courts official record of the proceeding. No opposition to the Motion was filed by either of the defendants.

The Court reviewed and considered the all of the pleadings and papers filed in support of the Motion, together with all other pleadings and papers on file in this case and the above referenced Bankruptcy case, and considered the arguments, contentions and requests of counsel as made in open session.

FINDINGS OF FACT

The Court finds that there is no genuine controversy as to any of the following facts all of which are deemed established and adjudicated in Plaintiff's favor:

1. This Court has jurisdiction over this Adversary proceeding pursuant to 28 U.S.C. §§ 1334(a) and (b) because it arises under and is related to the above referenced Bankruptcy Case. (Undisputed Fact ("UF") No. 1)
2. Venue is proper in the Southern District of California in accordance with 28 U.S.C. § 1409(a) because this proceeding arises in or is related to the above referenced Bankruptcy Case. (UF No. 2)
3. George Petrou, sometime referred to as "Debtor" is, and at all times relevant to the Complaint was, a resident of the State of California. (UF No. 3)
4. Defendant Irene is the Debtor's daughter, and at all time relevant to the Complaint was an adult residing in the state of South Carolina. (UF No.4)
5. This Complaint relates to two separate Deeds of Trust recorded against Debtor's residential real property located at 4575 Sherlock Court, San Diego, California and more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Residence"), naming his daughter Irene as the beneficiary. The Debtor is the fee owner of the Residence which is scheduled as property of this estate. (UF No. 5)
6. Irene was an undergraduate at the University of California at San Diego from 1989 through 1991. (UF No. 6)

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7. George Petrou filed a Chapter 11 petition for bankruptcy on April 20, 1992 (the "First Bankruptcy").

(UF No. 7)

8. Irene was a graduate student at Clemson University between 1995 and 1997. (UF No. 8)

9. On or about August 8, 1995, Irene executed an Application and Promissory Note for Federal Student Loans in the amount of \$4,000.00. (UF No. 9)

10. On or about September 8, 1996, Irene executed an Application and Promissory Note for Federal Student Loans in the amount of \$8,940.00. (UF No. 10)

11. On December 13, 1996, Irene had just obtained nearly \$13,000.00 in student loans; and that same day Debtor recorded a Trust Deed against his residence to secure an alleged loan of \$85,000 to him from Irene (the "1996 Trust Deed"). (UF No. 11)

12. The Debtor and Irene contend that the 1996 Deed of Trust constitutes a valid and enforceable lien on the Debtor's residence. (UF No. 12)

13. Although the Trust Deed states that the debt is based on a promissory note, no promissory note for the December 13, 1996 Trust Deed exists. (UF No. 13)

14. Four months later, on March 7, 1997, Irene executed another Application and Promissory Note for Federal Student Loan. This time the loan was in the amount of \$3,500.00. (UF No. 14)

15. Thereafter, on August 1, 1997, Irene executed an Application and Promissory Note for Federal Student Loans in the amount of \$7,100.00. (UF No. 15)

16. Although Debtor had already transferred an interest in his property eight months earlier, Debtor's First Bankruptcy case was not closed until August 29, 1997. (UF No. 16)

17. On October 11, 1997, Irene executed an Application and Promissory Note for Federal Student Loans in the amount of \$1,600.00. (UF No. 17)

18. After graduate school, Irene attended medical school at the University of South Carolina from 1998 until 2002. (UF No. 18)

19. While in medical school, Irene continued to incur additional student loan debt. On May 15, 1998, Irene executed an Application and Promissory Note for Federal Student Loans in the amount of \$18,500.00. (UF No. 19)

20. In or about June 1998, Irene requested deferment of her outstanding student loans due to her inability to pay because she was in medical school. (UF No. 20)

21. On June 30, 1998, Irene executed a South Carolina Student Loan Corporation Professional Access Loan for Medical Students Application and Promissory Note in the amount of \$7,068.00. (UF No. 21)

22. While still a medical student, On July 9, 1998, Irene telephoned the South Carolina Student Loan Corporation to inform it that she was not able to make past due payments on her education loans. (UF No. 22)

23. On March 9, 1999, Irene executed a South Carolina Student Loan Corporation Professional Access Loan for Medical Students Application and Promissory Note in the amount of \$5,000.00. (UF No. 23)

24. Also on March 9, 1999, Irene executed an Application and Promissory Note for Federal Student Loans in the amount of \$18,500.00. (UF No. 24)

25. On July 31, 1999, Irene executed a South Carolina Student Loan Corporation Professional Access Loan for Medical Students Application and Promissory Note in the amount of \$10,000.00. (UF No. 25)

26. Although Irene had incurred nearly \$85,000.00 in student loan debt over the past five years and had demonstrated her inability to pay those loans, on April 4, 2000, Debtor recorded a second Trust Deed against his residence to secure an alleged loan of \$97,000.00 to him from Irene (the "2000 Trust Deed"). (UF No. 26)

27. The Debtor and Irene maintain that the 2000 Trust Deed constitutes a valid and enforceable lien on the Debtor's residence. (UF No. 27)

28. Similar to the earlier 1996 Trust Deed, this Trust Deed states that it is premised on a promissory note. However, like the 1996 Trust Deed, no promissory note exists to support the 2000 Trust Deed. (UF No. 28)

29. However, Irene earned only a minimal income between 1989 and 2002. (UF No. 29)

30. On April 9, 2001, Irene executed a South Carolina Student Loan Corporation Professional Access Loan for Residency Interview and Relocation Application and Promissory Note in the amount of \$8,000.00. (UF No. 30)

31. In June 2002, Irene was married. No funds or inheritance were provided to her as a dowry. (UF No. 31)
32. Debtor filed the instant Chapter 7 petition for bankruptcy on September 4, 2002. (UF No. 32)
33. On June 16, 2003, Irene executed a Uniform Residential Loan Application for the purchase of a house. No reference is made in that loan application to any loan obligation due to Irene from the Debtor. Nor did she indicate holding an interest in either the 1996 or 2000 Trust Deeds on Debtor's residence. Irene also did not list any interest in a foreign account or trust as an asset. (UF No. 33)
34. On September 15, 2003, Irene requested an Economic Hardship Deferral due to her inability to pay on her student loans because her monthly income was only \$2,219.52. (UF No. 34)
35. On November 5, 2003, Irene requested an Economic Hardship Deferral due to her inability to pay on her student loans because her annual income was only \$33,500.00. (UF No. 36)
36. On November 10, 2003, plaintiff Thomas Ruben ("Ruben") filed this complaint against the Debtor and Irene for conspiracy and to declare the 1996 Trust Deed and the 2000 Trust Deed void. (UF No. 35)
37. Through discovery, the Debtor has produced bank books for the accounts from which the funds that Irene purportedly loaned to them, and secured by the 1996 and 2000 Trust Deeds, supposedly came from. All such bank books and accounts are in the name of the Debtor and his wife. No bank accounts or records have been produced that list Irene as a beneficiary. Also, Irene has never listed the 1996 and 2000 Trust Deeds or Debtor's obligation to her on her tax returns, on her applications for student loan, or on her application for a home loan. (UF No. 37)
38. Further, Irene never indicated an interest in any foreign accounts on a Schedule B of her tax returns. In fact, Irene is uncertain whether she filed a tax return at all prior to 2002. (UF No. 38)
39. At all times relevant herein, Debtor had control of and access to the accounts in Greece. (UF No. 39)
40. Irene has never had possession or control of the funds in any Greek account, nor has she ever used any funds from a Greek bank account. (UF No. 40)
41. No funds were ever provided to Irene for her education or for her dowry. (UF No. 41)
42. Between 1989 and 2002, Irene incurred approximately \$170,616.00 in student loan obligations. During that

same time period, Irene had little or no income. (UF No. 42)

43. Irene has testified that she would not enforce the purported debt owed by Debtor. Irene further testified that, notwithstanding the existence of the 1996 and 2000 Trust Deeds, she did not expect repayment of any loan from Debtor. (UF No. 43)

44. Debtor admits that he took cash withdrawals from the Greek account in his name to pay his creditors. (UF No. 44)

45. There were no terms of repayment for the alleged loans securing the 1996 and 2000 Trust Deeds. Nor were there any interest rates specified for the purported loans. (UF No. 45)

46. There has never been a reconveyance of either the 1996 Trust Deed or the 2000 Trust Deed that would remove the liens and the cloud on the Estate's title to the Residence created by those Trust Deeds. (UF No. 46)

47. In furtherance of the conspiracy the Debtor has asserted in the Schedules filed in the above entitled Bankruptcy case that the amount of the enforceable obligation secured by Irene's Trust Deeds was \$250,000 (Case No. 02-08705, Docket Item 7 (Schedules) Page 9 (Schedule D)).

48. The Debtor's assertion described in Paragraph 47 above was false, and it was known to be false by the Debtor at the time that it was made.

49. Beginning On July 25, 2003, Plaintiff requested this Court's approval to recover property for the benefit of the Estate pursuant to 11 U.S.C. § 503(b)(3)(B) by removing the cloud on the Debtor's title to the Residence created by the 1996 Trust Deed and the 2000 Trust Deed as well as other property recoverable as a result of the wrongful creation of that cloud. (see Case No. 02-08705-PB, Docket Items 20, 22, 23, and 24).

50. The Debtor had actual knowledge of and actively opposed Plaintiff's request to recover property for the benefit of the Estate pursuant to 11 U.S.C. § 503(b)(3)(B). (see Case No. 02-08705-PB, Docket Items 21 & 26).

51. On October 7, 2003, the Court entered its order granting creditor Thomas Ruben's Application for Court Approval to Recover Property for the benefit of the Estate pursuant to 11 U.S.C. § 503(b)(3)(B) (see Case No. 02-08705-PB, Docket Item 27).

52. On November 10, 2003, Plaintiff filed a complaint to commence this adversary proceeding (Docket Item 1).

53. The Complaint asserts two claims for relief. First — against Defendant Irene only — for recovery of damages for her participation in the ongoing conspiracy to defraud the Debtor's creditors by creating the false appearance that the Debtor had no equity in the Residence over and above his Homestead Exemption through the continuing assertion that the 1996 Trust Deed and 2000 Trust Deed (hereinafter collectively referred to as the "Irene's Trust Deeds") were bonafide, valid, and enforceable. (Docket Item 1 at Page 2, Line 19 through Page 4, Line 25). Therein the Plaintiff alleges that Irene's participation in the conspiracy was despicable conduct that subjected the Debtor's creditors, including Plaintiff to an unjust hardship, and was undertaken by Irene in a conscious disregard of the rights of Debtor's creditors, including Plaintiff's rights, so as to justify an award of exemplary and punitive damages. (Docket Item 1 at Page 4 Lines 22-25). The second claim for relief set forth in the Complaint seeks declaratory relief to establish that Irene's Trust Deeds are a legal nullity and therefore do not constitute a lien of any kind upon the Residence. (Docket Item 1, at ¶ 2, Line 19 through ¶ 5, Line 7).

54. On December 11, 2003, both defendants — the Debtor and Irene — filed and answered the Complaint in which they denied the material allegations contained therein and asserted seventeen affirmative defenses to the relief requested therein. (Docket Item 5).

55. Both the Debtor and Irene have continued to maintain and assert the validity of Irene's Trust Deeds throughout this litigation through and including April 4, 2005 (Docket Item 21).

56. Neither of the defendants — Debtor nor Irene — have filed any opposition to the motion.

57. The Court's made such further findings of fact and conclusions of law as were stated orally by the Court, and recorded in open session, and, are incorporated herein by this reference pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure, and Rule 52(a) of the Federal Rules of Civil Procedure.

58. To the extent that any of the Court's findings of fact include conclusions of law, they shall be deemed to be included as part of the Court's conclusions of law set forth below.

CONCLUSIONS OF LAW

Applying the applicable rules of law and equity to the undisputed facts established in this case, the court makes the following conclusions of law:

1. The Debtor, together with his spouse, Mary Petrou live, and at all times relevant to this action were fee owners of the Residence, which became property of the Debtor's estate upon the commencement of the Bankruptcy case.
2. The 1996 Trust Deed given by the Debtor and his spouse in favor of Irene does not secure any legally enforceable right against Debtor or his spouse, and is therefore a legal nullity. ¹
3. The 2000 Trust Deed given by the Debtor and his spouse in favor of Irene does not secure any legally enforceable right against Debtor or his spouse, and is therefore a legal nullity. ²
4. Beginning at a time which is uncertain, but not later than December 11, 1996, and continuing until at least April 4, 2005, the Debtor and others conspired to conceal from his creditors the full equity in the Residence by the artifice of executing and recording the 1996 Trust Deed and the 2000 Trust Deed . The Debtor and his co-conspirator(s), in furtherance of the conspiracy caused the 1996 Trust Deed to be recorded on December 13, 1996, and caused the 2000 Trust Deed to be recorded on April 4, 2000. ³
5. Beginning at a time which is uncertain, but not later than December 11, 2003, and continuing until at least April 4, 2005, Irene joined and participated in the conspiracy and thereafter intentionally assisted in the maintenance of the fraudulent concealment of equity from the Debtor's estate by her active participation in the defense of Plaintiff's

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¹ See, (1930) *Coon v. Shry*, 209 Cal. 612, 615; (1961) *Fleming v. Kagan*, 189 Cal.App.2d 791, 796; (1943) *Trowbridge v. Love*, 58 Cal.App.2d 746; see also California Civil Code s 2909; and cf. **National Tile & Terrazzo Co., Inc. v. Paterna**, 537 F.2d 329, 331 (9th Cir. 1976)

² See, (1930) *Coon v. Shry*, 209 Cal. 612, 615; (1961) *Fleming v. Kagan*, 189 Cal.App.2d 791, 796; (1943) *Trowbridge v. Love*, 58 Cal.App.2d 746; see also California Civil Code s 2909; and cf. **National Tile & Terrazzo Co., Inc. v. Paterna**, 537 F.2d 329, 331 (9th Cir. 1976)

³ See *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 774 (Conspiracy complete with agreement to wrongful conduct and action undertaken in furtherance of agreement established civil conspiracy); *Mosier v. Southern California Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022,1048 (Elements of civil conspiracy are (1) formation by agreement and (2) wrongful acts done in furtherance of the agreement).

Complaint. That participation constituted a continuing and fraudulent attempt to conceal at least \$250,000 of unencumbered equity in the Residence.

6. As a result of the conspiracy, Irene and her co-conspirators effectively concealed equity available to the estate in an amount not less than \$250,000.00 as of September 4, 2002.

7. Plaintiff has successfully established that Irene's Trust Deeds are fraudulent, shams, and legal nullities thereby creating property in the form of unencumbered equity available to the Debtor's estate and its creditors. Having done so, he is entitled to recover reasonable attorneys' fees and expenses of a litigation as expenses of the estate pursuant to 11 U.S.C. § 503(b)(3)(B). [The Litigation Costs]. The litigation costs are recoverable as an element of damage under the "Tort of Another Doctrine/ Third Party Tort Theory." ⁴

8. To the extent that any of the Court's conclusions of law include findings of fact, they shall be deemed to be included as part of the Court's findings of fact set forth above.

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⁴ *Gray v. Don Miller & Associates* (1984) 35Cal3rd498,507; *Sooy v. Peter* (1990) 220Cal.App.3rd.1305,1310; *Vacco Industries, Inc. v. Van Dan Berg* (1992) 5Cal.App.4th.34,56.

ORDER

Based upon all of the foregoing, and good cause appearing therefor;

IT IS HEREBY ORDERED and **DECREED** as follows:

- A.** The Plaintiff's Motion For Summary Judgment is **GRANTED**;
- B.** Without limiting the generality of the relief granted in paragraph A above, the Court further and specifically finds and adjudicates that,

FIRST CAUSE OF ACTION (Conspiracy):

1. Defendant Irene was an active co-conspirator for Debtor and others in conspiracy to conceal property, in the form of unencumbered equity from the Chapter 7 Trustee acting in the case and the Creditors of the Estate.
2. The Estate has been damaged by Irene's participation in the conspiracy to the extent of the Litigation Costs.
3. Plaintiff is entitled to a Money Judgment against Irene in the amount of the Litigation Costs, together with post Judgment interest at the appropriate legal rate.
4. Because there is no genuine controversy as to any material fact necessary for the determination of the First Claim For Relief, other than facts relating to Plaintiff's entitlement to an award of Punitive damages against Irene in addition to compensatory damages and if so the appropriate amount of punitive damages, Plaintiff has established his entitlement to Judgment consistent with this Order on the First Claim For Relief, insofar as the claim for compensatory damages for civil conspiracy is concerned.
5. This order is made without prejudice to Plaintiff's right to such an award of punitive damages as part of the First Claim For Relief — either by a motion for summary judgment or trial — and Irene's right to defend against that claim.

SECOND CLAIM FOR RELIEF (DECLARATORY RELIEF):

1. The 1996 Trust Deed is a sham, a fraud, and a legal nullity. It is not enforceable for any purpose.
2. The 2000 Trust Deed is a sham, a fraud, and a legal nullity. It is not enforceable for any purpose.

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3. Because there is no genuine controversy as to any material fact necessary for the resolution of the claims asserted in the Second Claim for Relief, Plaintiff is entitled to Judgment consistent with this Order in his favor on the Second Claim for Relief.